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1 (The following proceedings were held at 8:29 a.m.)

2 THE COURT: Yanli Gong v. NCL.

3 Counsel, please state your appearances.

4 MR. BUTLER: Yes, Judge. For the estate and those
5 Plaintiffs, Frank Butler.

6 THE COURT: Good morning, Mr. Butler.

7 MR. SILVERMAN: Good morning, Your Honor. Noah
8 Silverman on behalf of NCL.

9 THE COURT: Good morning, Mr. Silverman.

10 We have this morning the Defendant's motion to dismiss
11 and/or strike the Plaintiffs' complaint. I asked you gentlemen
12 to go out and speak to each other while we waited to begin to
13 see if you could narrow any of the issues. Have any of the
14 issues been narrowed?

15 MR. BUTLER: If I may, Your Honor.

16 THE COURT: Yes.

17 MR. BUTLER: With regard to the Plaintiffs' claims for
18 the widow and the mother-in-law and the two children, as far as
19 negligent infliction of emotional distress, those type of
20 damages, that -- we need to replead those a little bit more
21 fully. I will get with the family and make sure of the more
22 specific facts than we have in the complaint right now.

23 THE COURT: Is that going to the argument that the
24 Defendant makes at Page 5 of the motion, or is that to address
25 the arguments involving the claim made for intentional

1 infliction of emotional distress?

2 MR. BUTLER: The intentional infliction of emotional
3 distress, we will replead that --

4 THE COURT: All right.

5 MR. BUTLER: -- if we have the facts to be able to
6 support that.

7 THE COURT: All right. So as to Count 4, that claim
8 is dismissed with leave to amend.

9 MR. BUTLER: Thank you, Your Honor.

10 THE COURT: Okay. So we don't have to address that
11 one.

12 So let's begin by addressing the Defendant's first
13 argument with regard to *Death on the High Seas Act* and the
14 argument that the estate is not entitled to recover
15 nonpecuniary damages.

16 Mr. Silverman, I will hear from you.

17 MR. SILVERMAN: Thank you, Your Honor.

18 DOHSA and the legion of case law citing to DOHSA is
19 very clear that you're not allowed to have nonpecuniary
20 damages; in particular, the mental distress damages that
21 Mr. Butler's clients have alleged in this claim. It's simply
22 not allowed under maritime law. There is no question DOHSA
23 applies. It was pled in the complaint. This took place in the
24 foreign territorial waters of a foreign country and, therefore,
25 DOHSA applies.

1 THE COURT: Right. So this is not a motion to dismiss
2 the DOHSA count. It's a motion to strike the request. For
3 nonpecuniary damages, that's contained within that count,
4 correct?

5 MR. SILVERMAN: Yes, Your Honor.

6 THE COURT: All right. And Mr. Butler?

7 MR. BUTLER: Your Honor, we --

8 THE COURT: I'm sorry. Could you use the microphone?
9 Just put it closer to you so we can hear you better. Thank
10 you.

11 MR. BUTLER: Yes.

12 We cited the *Blow vs. Carnival* case, which stood for
13 the proposition that lost household support --

14 THE COURT: I can't hear you.

15 MR. BUTLER: -- lost household support from the
16 deceased, love, guidance, support, personal severe mental
17 distress with physical manifestation was considered as
18 nonpecuniary damages under DOHSA.

19 And we basically said in our response and our reply
20 that the Defense is -- is, under DOHSA, stating the damages too
21 strictly and that there can be room for severe emotional
22 distress with physical manifestations that the *Blow* case said
23 are not nonpecuniary and that damages for mental pain and
24 suffering were recoverable to the extent it's not about the
25 deceased. It's about the people who were there.

1 THE COURT: And the *Blow* case, Stephanie, is B-L-O-W.

2 MR. BUTLER: It is, Your Honor. And that is in our
3 brief on Page 3.

4 And there are a couple of others. *Kennedy vs.*
5 *Carnival*. I'm sorry. There is that one other one.

6 THE COURT: So you're both in agreement in essence
7 that the only damages that you're entitled to under DOHSA are
8 pecuniary damages, right?

9 MR. SILVERMAN: That's not what Mr. Butler is arguing.

10 MR. BUTLER: No. We're also arguing nonpecuniary
11 damages. What I just enumerated is the loss of household
12 support, personal severe mental distress with physical
13 manifestations, and that was held not to be nonpecuniary in
14 *Blow*.

15 THE COURT: How do you address all of the cases cited
16 by the Defendant? The Defendant cites, for example, *Nichols*,
17 *N-I-C-H-O-L-S, v. Carnival*. The Defense cites *Kennedy v.*
18 *Carnival*.

19 Mental pain and suffering, loss of companionship,
20 those damages cannot be recovered under DOHSA. Those are
21 indeed nonpecuniary. You're not seeking those or you are?

22 MR. BUTLER: We are seeking those damages.

23 THE COURT: And you're seeking those under the
24 authority of *Blow*?

25 MR. BUTLER: Yes.

1 THE COURT: And what do you say to that,
2 Mr. Silverman?

3 MR. SILVERMAN: That is not what *Blow* stands for, Your
4 Honor. The cases are legion that nonpecuniary damages are not
5 allowed under DOHSA. The one aspect that Mr. Butler did cite,
6 loss of household support, is a pecuniary damage, and we
7 haven't argued that. We're arguing the mental distress and all
8 of those damages that flow from mental distress. None of that
9 is recoverable under DOHSA.

10 THE COURT: I think the Defendant has the better
11 argument here, Mr. Butler. The claim is certainly not
12 dismissed. However, you cannot recover nonpecuniary damages.
13 And as I just referenced, with regard to the case law with
14 *Nichols* and with *Kennedy*, damages for loss of companionship,
15 damages from mental pain and suffering are indeed nonpecuniary
16 and, hence, not recoverable under DOHSA. You have other counts
17 in that complaint that will be seeking those types of damages,
18 and we'll get to those.

19 So the Defense is correct. Those -- to the extent
20 those damages are sought in your DOHSA count, they are
21 stricken.

22 MR. BUTLER: Yes, Your Honor.

23 THE COURT: The next argument is that the complaint is
24 a shotgun pleading. And I know you've made these arguments
25 before, Mr. Silverman, but in my estimation, a shotgun pleading

1 exists and arises where you incorporate the preceding
2 allegations of the prior counts in addition to the general
3 allegations. It's not a shotgun pleading for every count to
4 reincorporate the general allegations, and that's what we have
5 here.

6 MR. SILVERMAN: Well, Your Honor, I would disagree. I
7 think some courts actually do find that incorporating every
8 factual allegation into every count, even though all those
9 allegations have nothing do with the count, is, in fact, a
10 shotgun pleading.

11 THE COURT: I disagree. And you're certainly capable
12 of responding to the complaint, as you have done most capably
13 in your motion in understanding what each of the claims is. So
14 I will not dismiss the complaint on the basis that it's a
15 shotgun pleading.

16 Then the next argument is count -- addresses Counts 1
17 to 3. So let's begin with the -- with the arguments as to
18 Count 2 for gross negligence.

19 I will hear your arguments now.

20 MR. SILVERMAN: Yes, Your Honor.

21 They haven't pled a count for gross negligence. They
22 haven't pled any facts that would support a claim for gross
23 negligence. They've pled an ordinary negligence claim; in
24 fact, the same allegations that they pled factually in the --
25 of their two negligence claims.

1 It's just a simple, garden-variety, ordinary
2 negligence claim. There is absolutely no basis in fact pled in
3 this complaint that would give rise to a gross negligence
4 claim.

5 THE COURT: Well, you saw the arguments that
6 Mr. Butler makes in his response to your motion.

7 Unlike other cases here, the Plaintiffs indicate or
8 allege that your client was aware the Horseshoe Bay Beach
9 presented an increased risk of injury of more than unusual
10 peril -- but despite that knowledge, your client promoted that
11 beach -- that you all knew the risk of death from warnings
12 issued by multiple government agencies and news reports of
13 prior incidents and your client's close interactions with the
14 Bermudian government and tourist programs, and, nonetheless,
15 again, you actively encouraged your passengers to visit the
16 area.

17 Why is that not sufficient for gross negligence?

18 MR. SILVERMAN: Because those are the same allegations
19 that they have for general ordinary negligence.

20 THE COURT: Well, that's because, again, they
21 incorporate all those allegations into each of the counts. But
22 that's not an issue. We're looking to see are there
23 allegations that support this count within the general
24 allegations.

25 MR. SILVERMAN: Right. And all they've stated are

1 conclusory allegations. And there is also issues with what
2 their pleading factually -- which we addressed further in the
3 motion. But that doesn't state a claim for gross negligence.

4 We're aware of a risk at a beach. It's just not gross
5 negligence. It's like a claim, and it wouldn't be allowed
6 under DOHSA, anyway. There would be no additional damages for
7 gross negligence. DOHSA is the sole exclusive remedy once it
8 is applied for the estate.

9 THE COURT: All right. Mr. Butler?

10 MR. BUTLER: Yes, Your Honor.

11 We -- we do believe that we have stated enough facts
12 to make a claim for gross negligence. And, in fact, I would
13 add on to what the Court said that not only was there knowledge
14 on the part of the cruise line, but they came to my client to
15 provide them information that they have vetted these different
16 excursions, they were familiar with this one, and they
17 basically said -- we put the language right in the complaint.

18 Not only stated it; alleged it in our paragraphs. But
19 took the information that the clients looked at from the NCL
20 website and put it into the complaint itself, which told
21 these -- this family with the two kids to -- You can trust us.
22 We've vetted these excursions. Don't do the other excursions.
23 Do the excursions that we have vetted.

24 And they even say things with regard to the safety of
25 them. It's going to be better if you go with us rather than on

1 just some random excursion. And so they've really
2 affirmatively reached out and went beyond just having notice
3 and so forth as the typical negligence case and more or less
4 sold this family on the idea of, Come to this excursion.

5 In fact, if you look at the -- in the complaint on --
6 it's Paragraph 19. We talk about the difficulty scale. And
7 they do call this an excursion, and we took that from the
8 Horseshoe Bay Beach detail that NCL put together. It says it's
9 an excursion. It says it's going to be just beach and
10 swimming, and it is obviously more than that, and it says it
11 was easy.

12 So they didn't just sell the excursion. They told us
13 it was going to be easy for this family to do this. They went
14 above and beyond simple negligence here.

15 MR. SILVERMAN: Your Honor --

16 THE COURT: Yes.

17 MR. SILVERMAN: These are the same allegations in any
18 shore excursion case. This is not above simple negligence or
19 ordinary negligence. Every case would be a gross negligence
20 case if Your Honor felt that those allegations rose to the
21 level of gross negligence for shore excursions.

22 One other missing piece from this complaint is whether
23 or not these Plaintiffs ever purchased an excursion from NCL.
24 They tiptoe around that, but there is nothing in this complaint
25 that states that they actually took an NCL excursion.

1 THE COURT: Did they, Mr. Butler? You would know.

2 MR. BUTLER: Your Honor, that's why we say in
3 Paragraph 20 when NCL describes this as an excursion -- whether
4 they paid money for it or not or took NCL's offering of going
5 on this -- this trip, this excursion -- that that is what they
6 relied upon. I can't tell you if there was money exchanged for
7 that -- for the travel part, but there always is.

8 And the second part of this is that NCL is making
9 money by taking these passengers to these different ports of
10 call. That's how they make their money. So when they go to
11 these ports of call, instead of just ferrying passengers, you
12 know, 100 miles offshore and 100 miles back, this is part of
13 how they make their money.

14 Whether they paid for this -- paid NCL for this
15 specific thing I would have to find out. We should know the
16 answer to that already, I would admit.

17 THE COURT: Well, here it sounds like they didn't
18 purchase the shore excursion sold by the cruise line, right?

19 MR. BUTLER: It is -- they are sold by the cruise
20 line. We've had cases where they have been sold prior to
21 getting on. And I know my clients were looking at this prior
22 to getting on and they said, This is something we want to do,
23 when they got on board. We say this in the complaint, that
24 they relied upon preboarding representations by NCL. They
25 relied on representations by representatives of NCL when they

1 got on the boat.

2 Whether there was a -- whether there were \$50 per
3 person exchanged, I don't know the answer to that today. We
4 should, really, but I don't think that it changes the dynamic
5 that this is -- NCL calls it an excursion. NCL does. It's in
6 Paragraph 20 of the complaint. NCL calls it an excursion.

7 THE COURT: NCL what? I'm sorry.

8 MR. BUTLER: NCL calls it an excursion, and it's in
9 Paragraph 20 that we included that language. They call it
10 beach and swimming, and they said it was easy. And it's
11 entitled "Horseshoe Bay Beach Transfer Details."

12 THE COURT: So to state a cause of action for gross
13 negligence, you need to allege the existence of circumstances
14 which together constitute an imminent or clear and present
15 danger amounting to more than the normal and usual peril, the
16 showing of knowledge or awareness of the imminent danger by the
17 Defendant and an act or omission that occurs in a manner that
18 evinces a conscience disregard of the consequences.

19 Those are the elements. The Defendant cites to them
20 in the motion to dismiss, citing to *Chubb*, C-H-U-B-B, *Seguros*,
21 S-E-G-U-R-O-S, *Chile*, C-H-I-L-E.

22 I think you're -- it's a close call, but the
23 Plaintiffs do meet those allegations barely. And so I will
24 allow the claim to -- to be stated.

25 Then we go on to the next argument, which is lack of

1 notice.

2 MR. SILVERMAN: Yes, Your Honor. There's a lot of
3 words in this complaint, but none of it amounts to notice.
4 They cite to prior incidents without providing any facts
5 relating to prior incidents or how NCL would know of any of the
6 prior incidents, whether any of them occurred at the same
7 beach. It's the same thing over and over again.

8 People cite to prior incidents in these complaints all
9 the time without providing the facts. The law is pretty clear.
10 You actually have to provide some factual allegations that
11 would actually put the cruise line on notice that an incident
12 occurred.

13 So, for instance, somebody drowned at that beach.
14 Just because they drowned at the beach doesn't mean NCL is
15 going to know about it. If it involved an NCL passenger and it
16 was within a reasonable time frame, that may provide notice to
17 the cruise line, but just simply saying there were prior
18 incidents at beaches in Bermuda or at this particular beach is
19 not sufficient to establish notice.

20 Plaintiff also goes into they have a relationship with
21 the Bermudian tourist board, and because of that, they knew
22 this beach was dangerous. That is a leap without any factual
23 support whatsoever. There are no factual allegations that NCL
24 was ever told of any danger to this particular beach by the
25 government of Bermuda, by the tourist board.

1 They tried to cite to random articles on the
2 Internet. There is no obligation for Norwegian or any other
3 ship owner to scour the Internet for any of this stuff. They
4 simply throw the kitchen sink of -- of speculation into the
5 complaint without any actual facts that NCL was on notice and
6 was aware of the danger specific to this beach.

7 THE COURT: I will hear from Plaintiff's counsel.

8 MR. BUTLER: Yes, Your Honor.

9 I actually think this is the strong suit of the
10 complaint; the fact that there was so much prior notice here.
11 We start with Paragraph 17 of the complaint wherein NCL says,
12 We work closely with our, quote, destination partners, and,
13 quote, To keep our guests as safe as possible, we highly
14 recommend taking our company-organized shore excursions as a
15 more controlled environment for you to enjoy your time in each
16 of the destinations.

17 And we -- the complaint is just replete with notice of
18 prior drowning deaths there. The complaint demonstrates that
19 NCL's been coming to the island since at least 1998, has two or
20 three renewed contracts.

21 They say -- not us. They say that they deal with
22 the -- let me say the exact verbiage that they used on their
23 website. NCL works closely with local government and health
24 agencies. There is -- there is information put out by the
25 health -- basically the health ministry of Bermuda that we've

1 had drownings here.

2 And they say -- this is in the complaint. They say
3 that there are no lifeguards in March of the year. There
4 aren't any. The lifeguards don't show up until May through
5 October and that is known.

6 And so this is -- I would hesitate to --

7 THE COURT: Where do you allege about the lack of
8 lifeguards? What paragraph, again?

9 MR. BUTLER: Paragraph 44.

10 THE COURT: 44.

11 MR. BUTLER: It says --

12 THE COURT: No.

13 MR. BUTLER: I'm sorry. 44 or 45. In 44, we allege
14 NCL had notice of the dangerous conditions through public
15 warnings from multiple government entities, the available
16 weather and sea conditions forecast, including for that
17 specific day, a variety of cruise ship passenger reports and
18 prior similar incidents.

19 THE COURT: I'm sorry. Where do you allege that there
20 are no lifeguards during those months and that the Defendant
21 knew that?

22 MR. BUTLER: It is -- 45 is --

23 THE COURT: Most people in Bermuda don't swim in the
24 sea until after Bermuda Day in late May, but that doesn't tell
25 me that there are no lifeguards and that the Defendant knew

1 that.

2 MR. BUTLER: It's in Paragraph 48. I apologize.

3 THE COURT: 48?

4 MR. BUTLER: 48.

5 THE COURT: Oh.

6 MR. BUTLER: This is the Bermudan government issuing
7 warnings on social media about lifeguards have been extremely
8 active. This is two years before our incident.

9 THE COURT: Right. But where does it say that they
10 will not be there when your client -- when the decedent was
11 there?

12 MR. BUTLER: We --

13 THE COURT: I think that's on Paragraph 50, right?

14 MR. BUTLER: Yes. Right.

15 THE COURT: The U.S. Consulate in Bermuda --

16 MR. BUTLER: Yes.

17 THE COURT: -- in April 2024, less than a month after
18 the incident. So that doesn't furnish notice to the Defendant
19 the month before.

20 MR. BUTLER: Just one second.

21 Your Honor, for that -- for that part of it from the
22 Bermudian Government, NCL has said they are working with those
23 authorities and talked to -- or represented to our client
24 that -- that they were working with local authorities and so
25 forth.

1 And as we said before, the totality of the facts are
2 that the vessel regularly stops there and they are going to
3 know whether there are lifeguards or not there. And this
4 announcement made a month after the death is not the same as
5 NCL not knowing that there aren't lifeguards there in March.

6 And so from the totality of the prior drownings --
7 which we listed out, I think, eight or ten of them from the
8 social media posts, which NCL has looked at before. We say in
9 our legal brief that they have used that as a shield, and when
10 we're trying to use it as a sword now --

11 THE COURT: Where in the complaint do you allege that
12 all of these social media posts that you quote from in
13 Paragraph 48 -- that the Defendant would look at those and know
14 about those?

15 MR. BUTLER: We're saying that they had access to it.

16 THE COURT: Having access to information doesn't mean
17 one is informed.

18 MR. BUTLER: 50 -- Paragraph 57 is where we list all
19 of the prior incidents, prior complaints on social media. What
20 we have said in our legal brief is that -- hold on a second.

21 Here is our brief at Page 10. Courts in the district
22 and even the Defendant itself, NCL itself, has found online
23 reviews could or did support a finding a cruise line's notice.
24 That's *Thayer v. NCL (Bahamas)*, and that was in 2020.

25 And then finding -- that report and recommendation was

1 finding notice based on allegations of online reviews from the
2 website alltrails.com -- not familiar with that one -- and
3 Tripadvisor, which we cite to for our ten or so notifications
4 where previous passengers of NCL complained about the subject
5 excursion being dangerous. That's from *Healy vs. NCL*.

6 Then we say again on Page 10, continuing, Defendant,
7 NCL, arguing in another matter that it was not on notice
8 because, among other things, there was no record of any
9 publicly available reviews for that subject tour.

10 So that's where they tried to use it as a shield,
11 saying, We've looked and we didn't see any, and now they're
12 saying, Oh, we just didn't look at all, which is -- it appears
13 they've been doing this for a while.

14 The cruise lines, naturally speaking, are worried
15 about their reputation and what's being said about them. To
16 believe that they're not looking at what people are saying
17 about them on the major -- on the major media outlets is
18 just -- I mean, the totality of it is we've pled way more
19 notice than we would ever get amongst any complaint here.

20 THE COURT: Pretty extensive. I would agree with you.
21 It's pretty extensive. Mr. Silverman is doing his job in
22 arguing that it's not quite enough, but --

23 MR. SILVERMAN: Your Honor, if I could address some of
24 this.

25 THE COURT: You may, certainly.

1 MR. SILVERMAN: I mean, first, the representations is
2 a different issue, what we represented to the Plaintiff. But
3 none of these prior incidents are alleged to have been NCL
4 passengers. None of them have been alleged to have been
5 reported to NCL.

6 What Mr. Butler is saying is because there are things
7 out there on social media -- none of which -- half of which are
8 not even similar to what we're talking about here. This is
9 also a beach.

10 THE COURT: Um-hmm.

11 MR. SILVERMAN: Okay. So any body of water at any
12 given point in time -- whether it's Miami Beach, whether it's
13 Laguna Beach, whether it's a beach off of New York -- is going
14 to have different weather conditions at any given point. None
15 of these state that they're NCL passengers.

16 THE COURT: Paragraph 64.

17 MR. SILVERMAN: Okay. Paragraph 64, from Connecticut,
18 was knocked over by a wave and pronounced dead.

19 THE COURT: I'm sorry? Paragraph 64 of the complaint.
20 Those two were NCL passengers, both in Bermuda.

21 MR. SILVERMAN: Okay. Well, 64, I don't think it says
22 that it was a NCL passenger, but --

23 THE COURT: Yes. It says one passenger aboard a
24 similar NCL cruise from New York to Bermuda docking at the same
25 Royal Naval Dockyard nearly died due to drowning in Bermuda.

1 MR. SILVERMAN: Okay.

2 THE COURT: And a 56-year-old passenger from the same
3 NCL ship died on an NCL snorkeling expedition.

4 MR. SILVERMAN: And that's exactly why these don't get
5 them there. Just because somebody died in the country of
6 Bermuda does not make this a prior similar incident that could
7 even remotely establish notice that this particular beach was
8 dangerous.

9 THE COURT: Right. If this was the only allegation,
10 all right, but it's not. As Mr. Butler has said, this
11 complaint goes on and on and on and on about how it is that
12 your client was put on notice and aware and made
13 representations that it worked closely with the Bermuda
14 authorities to ensure safe shore excursions and labeled this
15 one as easy.

16 So they did some investigating, and the Plaintiff is
17 saying you all are on notice. I know you dispute it. The
18 question is getting it past the pleading stage.

19 MR. SILVERMAN: Understood. And that's what's wrong
20 with the complaint, though, Your Honor. The first step is
21 these people were not on an NCL shore excursion. It has not
22 been alleged that they were on an NCL shore excursion or that
23 we've -- so we don't get to the first base here.

24 They have a negligent misrepresentation claim based on
25 this. They have a nondelegable duty claim based on this. But

1 they haven't even alleged that they purchased an excursion,
2 that they relied on any representations from NCL in purchasing
3 the excursion from them, none of it.

4 THE COURT: That's your strongest point, not that your
5 client lacked notice of the dangers of swimming on this beach
6 in Bermuda, right.

7 And I think that's the problem Mr. Butler has. You
8 have to go back to your clients and find out, Did you all
9 purchase an NCL excursion and did the decedent rely on those
10 representations to take that NCL excursion and died, right?
11 You don't make those allegations, and you haven't answered my
12 question directly.

13 MR. BUTLER: If I may speak to that.

14 THE COURT: Yes.

15 MR. BUTLER: The case law says -- I don't know that I
16 have it right here with me today. The case law says the cruise
17 line must warn passengers about dangers of which they know and
18 should reasonably know off the ship.

19 So there was a time where cruise ships were stopping
20 in Jamaica and it was a particularly violent time, a lot of
21 gangs going on.

22 THE COURT: I recall. Yes.

23 MR. BUTLER: And the fact that the passengers who
24 ended up on the wrong side of the gangs did not purchase
25 anything from the cruise line other than getting there did not

1 relieve the cruise line of warning their passengers of dangers
2 about which they knew or should've known. It was widely known.
3 Certainly, to the cruise lines it would have been widely known
4 that it was dangerous to be in Jamaica during that time.

5 THE COURT: Right. I recall.

6 MR. BUTLER: Yeah.

7 THE COURT: So that's the theory you're traveling on.
8 My client didn't purchase an NCL shore excursion. Fine. And
9 if you all made representations that the NCL shore excursion to
10 this particular body of water would be easy and you made
11 representations -- and failed to make representations that, in
12 fact, a lot of drownings take place there. Beware.

13 MR. BUTLER: Yes.

14 THE COURT: In any event, those allegations, in my
15 view, are sufficient, Mr. Silverman. I won't dismiss the
16 complaint for that reason.

17 MR. SILVERMAN: Okay.

18 THE COURT: Then you make the argument again that the
19 Plaintiff improperly seeks to impose heightened duties of care
20 on NCL. And I use the word "again" because you've made these
21 arguments to me before in the past.

22 And I think Mr. Butler was very accurate in quoting
23 back my own case law, my own decisions where I've declined to
24 roll up my sleeves and go line item by line item saying, This
25 one is a heightened duty of care. That one's not, if the

1 complaint otherwise states a cause of action.

2 MR. SILVERMAN: I understand, that, Your Honor. As
3 Mr. Butler just said, he's proceeding under a theory that it's
4 a failure to warn of conditions they knew or should have known
5 about. That is the only theory he can proceed upon.

6 THE COURT: All right. But I'm not going to start
7 saying, This one works. This one doesn't, if the complaint
8 otherwise states a claim. I've already declined to do that in
9 written decisions, published decisions that I know you're aware
10 of, so I won't do it here either.

11 The next one is Count 5, negligent misrepresentation.

12 MR. SILVERMAN: Usual issues with the negligent
13 misrepresentation claim, Your Honor. First is under Rule 9(h)
14 that require to plead it with specificity. They have not done
15 so. How, when, where, why, what they read, when they read it,
16 also that they relied on it in purchasing an excursion.

17 THE COURT: Or going to that beach.

18 MR. SILVERMAN: Correct.

19 THE COURT: Right.

20 MR. SILVERMAN: That's the first level. The second
21 level, Your Honor, is that a lot of what they are asserting is
22 not considered actionable. Your Honor's case of *Balaschak* is a
23 perfect example of that. Stating that something is safe or
24 reliable certainly does not get them to a negligent
25 misrepresentation claim, even if they have properly pled the

1 specific facts they were required to plead.

2 THE COURT: All right. Mr. Butler?

3 MR. BUTLER: Yes, Your Honor.

4 THE COURT: And *Balaschak*, by the way, Stephanie, is
5 B-A-L-A-S-C-H-A-K.

6 So you can't proceed just on the basis of some
7 allegation that it's safe to go swimming there, Mr. Butler.
8 What's the negligent misrepresentation beyond that?

9 MR. BUTLER: The misrepresentation is that they
10 actually vetted the scene and they hadn't.

11 THE COURT: That they actually --

12 MR. BUTLER: That they actually vetted the scene to
13 know that it was safe and they hadn't. That was the
14 representation as to who, what, when, why and where. The who
15 is to our folks. The where is about on board, before they got
16 on board, on their website and the -- that's the how they did
17 it. And when they did it was before and after they got on
18 board. And the why is, again, about the -- getting the money
19 for the cruise from those folks to come to this location.

20 But the additional step is that they made this
21 additional representation. They didn't just say, Here is an
22 excursion you can go on. The complaint is very clear about
23 that. They made representations that, You want to trust us
24 because we've vetted these excursions. Don't go on these other
25 ones -- they say that -- don't go on the other ones. And we're

1 going to make these safer -- or you're going to be in a safer
2 place if you go with us on these, and they hadn't vetted it at
3 all.

4 And if they did -- it seems to me, Your Honor, that
5 they're saying, We didn't have knowledge about all these prior
6 incidents, but yet they make statements that, We've vetted
7 these -- we vetted the excursion. We dealt with the local
8 authorities, and we're in touch with them. You can trust us.

9 It can't be both. It can't be. And that is the
10 misrepresentation. It's that it was safe and they vetted it
11 and they didn't.

12 MR. SILVERMAN: And, Your Honor, they have not alleged
13 any specifics whatsoever as to how, what, when or why. What
14 did they read? What are they saying said this excursion site
15 or this beach was safe? Because these facts are important.
16 Because NCL's website or promotional materials doesn't say,
17 We've vetted this beach. It doesn't say that the safe is
18 site -- that the site is safe, none of that.

19 And that's the issue with this negligent
20 misrepresentation claim -- is they actually do not meet the
21 pleading requirements under Rule 9(h) to state what they read,
22 when they read it and what they relied on in taking an
23 excursion, which they did not clearly take in this instance.

24 THE COURT: I do agree with the Defendant here,
25 Mr. Butler. You need to plead this cause of action with

1 greater particularity than you have done so rather than
2 generally saying before they boarded the ship, they looked at
3 some website. So you'll need to replead this one with greater
4 specificity as required for a negligent misrepresentation
5 claim.

6 MR. BUTLER: May I be heard on that, Your Honor?

7 THE COURT: Yes.

8 MR. BUTLER: I don't want to step over your ruling,
9 but --

10 THE COURT: It is a ruling, but try not to step over
11 it.

12 MR. BUTLER: So we do state in Paragraphs 15, 16, 17,
13 18 and so forth -- and it starts with the, Why book with us?
14 And that's really the key question here, Why book with us for
15 these excursions? It's because they have vetted this, and
16 we -- I don't think we can make it more specific than this.

17 And we've already put in a ton of information about
18 how -- Paragraph 14, electronic tickets encourage them to visit
19 NCL-selected shore excursions in Bermuda, that NCL excursions
20 have added benefits. They're provided by safer and reliable
21 operators.

22 On its website, Paragraph 15, they publish promotional
23 information material about such excursion, including the
24 Horseshoe Bay Beach shore excursion. And so we go on to say
25 that NCL encourages passengers to visit these shore excursions

1 selected specifically by NCL as opposed to venturing out on
2 their own and so forth.

3 And it even comes down to saying that assuring
4 passengers that these excursions are handpicked by NCL, who,
5 quote, works with reputable local tour operators --

6 THE COURT: You are stepping over my ruling,
7 Mr. Butler. And I have reviewed your complaint.

8 MR. BUTLER: Okay.

9 THE COURT: Paragraph 22 says Mr. Shin and Ms. Gong
10 looked at the NCL information prior to choosing Horseshoe Bay.

11 MR. BUTLER: Right.

12 THE COURT: What information, when, what exactly was
13 it that they read and considered, what date.

14 MR. BUTLER: That's what we're saying, Judge.

15 MR. SILVERMAN: Whether they selected an excursion
16 based on that.

17 THE COURT: I understand. So I've already ruled on
18 this count.

19 MR. BUTLER: That's what we're saying. In
20 Paragraph 20, this is what they were looking at.

21 THE COURT: I've already ruled on this count,
22 Mr. Butler. You need to plead it with more particularity.

23 MR. BUTLER: Okay. All right.

24 THE COURT: It's a fraud-based claim, right. You
25 deceived us. So you needed to say the who, the what, the when,

1 the where, the how. Because this is apparently not an
2 excursion that your client took, this so-called easy one. So
3 explain how it is, give us those details and give the Defendant
4 those details that Rule 9(b) requires.

5 MR. BUTLER: We'll fill it in, Your Honor.

6 THE COURT: Okay. And then Count 6, breach of
7 nondelegable duty. Is that a cause of action?

8 MR. SILVERMAN: We don't believe it's a cause of
9 action.

10 THE COURT: Is it a separate cause of action is my
11 question.

12 MR. SILVERMAN: Your Honor, we don't believe it's a
13 separate cause of action. There's one duty under maritime law
14 in a passenger negligence claim, and that's the duty of
15 reasonable care under the circumstances.

16 I think that, in the past, some courts have when there
17 is additional requirements made found on oral representation
18 that there may be an additional duty based upon a oral
19 contract. That is not the case here. I think that's the
20 *Witover* case. Here they're not even alleging that they
21 purchased an excursion.

22 THE COURT: *Witover*, W-I-T-O-V-E-R.

23 Yes.

24 MR. SILVERMAN: The only contract I can discern from
25 reading the complaint -- and it tiptoes around all of this --

1 is the cruise ticket, meaning the ticket to go on the cruise.
2 If that's the case, it's very clear from the cruise ticket
3 that -- that excursions are operated by independent
4 contractors.

5 There's no contract or consideration for a contract
6 with respect to these Plaintiffs going to this beach. I don't
7 see how they get to a complaint for nondelegable duty based on
8 contract.

9 MR. BUTLER: Yes, Judge. I think we can plead that
10 with more specificity as well.

11 And, again, we don't know the answer as to whether
12 they actually purchased the excursion here or whether there was
13 a charge for it. I should say whether there was a charge for
14 it or is it one that -- this is -- my understanding is this is
15 an excursion put on by NCL itself.

16 THE COURT: It is?

17 MR. BUTLER: That's what my understanding is. We
18 should've said that in the complaint.

19 THE COURT: All right. So when you replead, go ahead
20 and replead this one. I am frankly at a loss as to what this
21 cause of action does, is based on.

22 MR. BUTLER: I understand.

23 THE COURT: You have DOHSA; you have gross negligence;
24 you have negligence. What is this one?

25 MR. BUTLER: I'll talk to counsel about that one as

1 well.

2 THE COURT: All right. Very good.

3 Is there anything else on the motion to dismiss or
4 strike?

5 MR. SILVERMAN: No, Your Honor.

6 MR. BUTLER: No, Your Honor.

7 THE COURT: How much time do you need to replead,
8 Mr. Butler?

9 MR. BUTLER: Seven days.

10 THE COURT: Seven days. Very well.

11 Thank you very much.

12 MR. BUTLER: Thank you, Judge.

13 MR. SILVERMAN: Thank you for your time, Judge.

14 (The proceedings concluded at 9:12 a.m.)

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C E R T I F I C A T E

18

19 I hereby certify that the foregoing is an
20 accurate transcription of the proceedings in the
21 above-entitled matter.

22

23

24 _06/26/2025_
25 DATE



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